



L. JOYCE HAMPERS  
COMMISSIONER

# *The Commonwealth of Massachusetts*

*Department of Revenue*

*Leverett Saltonstall Building,*

*100 Cambridge Street, Boston 02204*

October 21, 1982

Your client ("Corporation") is a foreign corporation that manufactures high-technology machine tools. You inquire whether the Corporation will be required to pay the Massachusetts corporate excise under the following circumstances.

The Corporation maintains no place of business in Massachusetts. It will have no employees working predominantly in Massachusetts, but on occasion employees who reside in Virginia will come into Massachusetts for the purpose of "product promotion," and to install, assemble and service products after their sale. In any given year, employees may or may not enter Massachusetts for such purposes.

Orders will be solicited in Massachusetts by an independent sales representative, resident in Massachusetts, who will represent other manufacturers as well as the Corporation and who will be compensated by commission only. Orders will not be binding until approved by corporate officers in Virginia.

Deliveries to Massachusetts customers will be made by independent carrier, f.o.b. Virginia.

Every foreign corporation exercising its charter, or qualified to do business or actually doing business in Massachusetts, or owning or using any part or all of its capital, plant

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or any other property in Massachusetts, must pay the Massachusetts corporate excise (G.L. c. 63, Section 39).

General Laws Chapter 63, Section 39 provides that:

"[t]he excise levied herein is due and payable on any one or all of the following alternative incidents:

(1) The qualification to carry on or do business in this state or the actual doing of business within the commonwealth in a corporate form. The term 'doing business' as used herein shall mean and include each and every act, power, right, privilege, or immunity exercised or enjoyed in the commonwealth, as an incident to or by virtue of the powers and privileges acquired by the nature of such organizations, as well as, the buying, selling or procuring of services or property.

(2) The exercising of a corporation's charter or the continuance of its charter within the commonwealth.

(3) The owning or using any part or all of its capital, plant or other property in the commonwealth in a corporate capacity.

It is the purpose of this section to require the payment of this excise to the commonwealth by foreign corporations for the enjoyment under the protection of the laws of the commonwealth, of the powers, rights, privileges and immunities derived by reason of the corporate form of existence and operation."

Federal law establishes a threshold of in-state corporate activity below which a foreign corporation may not be subjected to a state tax upon, or measured by, net income derived from interstate commerce. 15 U.S.C. Section 381(a) (1970) provides:

"No State...shall have power to impose...a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection,

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and, if approved, are filled by shipment or delivery from a point outside the State; and

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1)."

Based on the foregoing, it is ruled that:

1. The Corporation will be liable for the Massachusetts corporate excise if its employees install, assemble, or service products in Massachusetts.

2. The Corporation will not be liable for the corporate excise if its only activity in Massachusetts is (a) the solicitation of orders by an independent sales representative, which orders are not binding until approved by corporate officers in Virginia, and (b) the delivery of goods into Massachusetts by independent carrier, f.o.b. Virginia.

You do not supply sufficient information to support a determination whether "product promotion" constitutes activity beyond the threshold established in 15 U.S.C. Section 381 that will subject the Corporation to the corporate excise.

You also inquire whether the Corporation will be liable for the corporate excise if the circumstances are the same as described above, except that the installation, assembly and servicing of products will be performed not by the Corporation, but by a wholly owned subsidiary corporation ("Subsidiary").

Based on the authorities cited above, it is ruled that in such circumstances the Corporation will be liable for the corporate excise if its employees engage in "product promotion" activity in Massachusetts beyond the threshold established in 15 U.S.C. Section 381, or if, in light of all the facts and circumstances of the case, the activities of the Subsidiary may be regarded as activities of the Corporation.

Nothing herein is to be construed as a determination whether the Corporation and the Subsidiary will constitute a unitary business the entire apportioned income of which will be included in the income measure of the corporate excise.

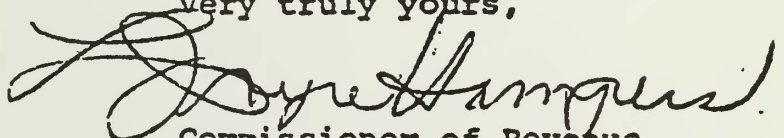
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For information about registration to do business in Massachusetts, you should contact:

Secretary of the Commonwealth  
Corporations Division  
Room 1717  
1 Ashburton Place  
Boston, Massachusetts 02108  
617-727-2850

After registration you will be sent appropriate tax return forms.

Very truly yours,



Commissioner of Revenue

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LR 82-103